Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LORENZO RODRIGUEZ, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE

U. S. COURT OF APPEALS FOR THE FIFTH

CIRCUIT

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52 pp

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APPENDIX

TABLE OF CONTENTS

Opinion of the U. S. Court of Appeals
for the Fifth Circuit, U. S. v. Rodriguez
(cited as U. S. v. Bermea)..... 1

Order Denying Rehearing..... 25

Speedy Trial Act..... 27

OPINION

United States of America

v.

Baldemar Bermea, Rogelio Bermea,
LORENZO RODRIGUEZ, et al

No. 92-7349

United States Court of Appeal, Fifth Circuit

August 25, 1994

<6334> Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, KING and WIENER, Circuit Judges.

KING, Circuit Judge:

This case presents a myriad of issues common to appeals of drug conspiracy convictions. Two less common issues are difficult. One such issue concerns the failure of the district court to conduct individual voir dire of the members of the jury following prejudicial midtrial publicity. The other such issue concerns the treatment of a pending James motion, ultimately ruled on at trial under the Speedy Trial Act.

I. BACKGROUND

A. Facts

The appellants in this case were charged with participating in one or both of two conspiracies to possess marijuana with the intent to distribute. The first of these conspiracies, lasting from late 1987 to mid-1988, allegedly involved eight person, including appellants Matilde Perez, Manuel Garcia, Honorio Garza, Enrique Avalos, Teodoro Pedraza, and Lorenzo Rodriguez. The Second conspiracy lated late 1988 through early 1989, and it allegedly involved seven persons including appellants Perez, Garza, Rogelio Bermea, Baldemar Bermea, and Guadalupe Bermea.

1. The First Conspiracy

Jaime Rios Gonzalez, an informant who began working for the Drug Enforcement Administration (DEA) and

other government agencies in 1988, testified at trial as follows. in 1988, Gonzalez was staying at a ranch owned by Garcia, getting paid about $200 per week for doing "mostly nothing." (Other testimony at trial indicates that Garcia's ranch was located just north of Mission, Texas, which is in Hidalgo County near the border with Mexico.) Avalos and Rodriguez also worked at Garcia's ranch while Gonzalez was there, and Gonzalez identified Avalos as Garcia's closet associate.

At some point, Garcia revealed to Gonzalez that he owned a grain trailer with a secret compartment used for carrying large quantities of marijuana. Garza, a constable of Starr County, Texas (adjacent to Hidalgo County), and Perez came to Garcia's ranch on one occasion, and Gonzalez overheard Perez tell Garcia not to let his workers "get lost"

because he had some work coming up. A little later, Garcia told Gonzalez and other workers that Perez and Garza would soon be providing a "load." A few days later Gonzalez and Rodriguez went to a different ranch owned by Carlos Gomez, where they met Garcia, Garza, Avalos, and several other men. That night, which was sometime in July 1988, Gonzalez, Avalos, Rodriguez, Garcia, and the other loaded bundles of marijuana into the secret compartment in Garcia's grain trailer; Gonzalez was told by Avalos and Garcia that the load contained over 1800 pounds. Although Garza was not present during the <6335>loading of the marijuana, Garcia told Gonzalez that Garza and Perez had supplied the marijuana.

The trailer containing the marijuana remained on the Gomez ranch for at least two weeks before Garcia gave the

order to move it. Another of Garcia's employees, Pepe Villarreal drove the tractor-trailer, while Gonzalez accompanied Avalos and Rodriguez in another vehicle. Ultimately the tractor-trailer was taken to the home of one "Shorty" Pedraza, which Gonzalez described as being in the country near Giddings, Texas. There Gonzalez, Villarreal, Rodriguez, Avalos, and Teodoro Pedraza unloaded the marijuana and stored it in a shed on Shorty Pedraza's property. Within the next few days, someone identified as "Ruben" arrived with Garza in a truck equipped with a U-Haul). Gonzalez saw Ruben pay Garza an indeterminate amount of money, and Gonzalez then left with Villarreal to return to Garcia's ranch. A few days real to return to Garcia's ranch. A few days later, Gonzalez saw Perez and Garza come to Garcia's ranch and deliver four plastic sacks containing

money to one of Garcia's henchmen. Garcia paid gonzalez $700 for this work. Gonzalez stayed with Garcia through August of 1988. In September of 1988 he began working for the D.E.A.

Gonzalez's testimony was corroborated in part by Carlos Gomez, who testified at trial as a government witness. Gomez testified that Garcia used Gomez's ranch as a site for loading marijuana into the secret compartment of Garcia's trailer ten or twelve times between January and August 1988. Gomez also verified that Perez brought marijuana to the ranch on two or three children occasions and that Gonzalez had been at the ranch to load marijuana with Garcia's men on one occasion.

2. The Second Conspiracy

Gonzalez testified that, near the end of this association

with Garcia, Garcia became upset with his cousins, the brothers Guadalupe, Baldemar, and Rogelio Bermea. Garcia told Gonzalez that the Bermeas had stolen his secret compartment design and built their own trailer with a secret compartment and that he was afraid that the Bermeas would get caught by law enforcement officers and thus ruin the usefulness of his design.

Gonzalez was recruited to be a driver for the Bermeas by Guadalupe and Baldemar Bermea in October of 1988. He went to a ranch, apparently owned by Guadalupe and Baldemar Bermea, in late October or early November 1988. Some time later the Bermeas' tractor-trailer arrived, and marijuana was brought to the ranch in a van by Perez and an unknown man. Perez told Gonzalez that he and Garza had decided to start working with the Bermeas because they could

get a "cheaper rate" with the Bermeas than they could with Garcia. While Rogelio, Guadalupe, and Baldemar Bermea kept a lookout, Gonzalez and others loaded marijuana into the secret compartment in the Bermeas' trailer, which Gonzalez described as "identical" to Garcia's compartment. The next day, Gonzalez left the ranch driving the tractor-trailer. He contacted the DEA agents with whom he had been working, and the agents arrested Rogelio Bermea, who was following Gonzalez in a separated vehicle, along the wa. Gonzalez continued with the shipment and met Baldemar Bermea a little later, but Baldemar Bermea apparently abandoned Gonzalez when Texas state highway troopers began to follow Gonzalez. Eventually Gonzalez was "arrested" by the DEA and the Hays County Sheriff's Department. He helped the law enforcement officers unload the marijuana, which tuned out to weigh a

little over 1300 pounds.

<6336>After Gonzalez turned the Bermeas' tractor-trailer over to the DEA, he returned to the Bermeas' ranch and told them that he had left the tractor-trailer at a certain truck stop with the key under the floor mat. Guadalupe Bermea told him that the tractor-trailer with a secret compartment in January 1989. Solis drove three shipments of marijuana for the Bermea successfully, and Perez talking to someone on the phone that he referred to as "Honorio." Additionally, while Solis was working for the Bermeas, he was told by Guadalupe Bermea that Rogelio and Baldemar Bermea that Rogelio and Baldemar Bermea were making plans with "Honorio" to transport another load of marijuana. On a fourth trip, in early March 1989, Solis was arrested, and it appears that he pleaded guilty to federal drug charges and was sentenced to

seventy months in prison. A DEA agent testified at trial that Solis was transporting about 1100 pounds of marijuana a the time he was arrested.

B. Procedural History

The final superseding indictment against the appellants contained four counts. The first count charged that from December 1987 through July 1988 Perez, Garcia, Garza, Avalos, Pedraza, Rodriguez, and two others not before this court conspired to possess more than 100 kilograms of marijuana with the intent to distribute in violation of 21 U.S.C. §§ 846,841(a)(1), and 841(b)(1)(B). The second count charged that from November 1988 through May 1989 Perez, Garza, Rogelio Bermea, Baldemar Bermea, Guadalupe

Bermea, and two others not before this court conspired to possess more than 100 kilograms of marijuana with the intent to distribute, also in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B). The third count charged Perez, Rogelio Bermea, and two others not before this court with possession of between 100 and 1000 kilograms of marijuana with the intent to distribute on or about November 16, 1988, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2. The final count charged Perez, Rogelio Bermea, Baldemar Bermea, and Guadalupe Bermea with possession of between 100 and 1000 kilograms of marijuana with the intent to distribute on or about March 3, 1989, also in violation of 21 U.S.C. §§841(a)(1) and 841(b)(2)(B), and 18 U.S.C. § 2.

After a two week trial, the jury returned its verdicts. Perez was found guilty on counts one, two, and three and was

found not guilty on count four. Garza was found guilty on counts one and two. Garcia, Avalos, Pedraza, and Rodriguez were found guilty on count one. Rogelio and Guadalupe Bermea were found guilty on counts two, three, and four. Baldemar Bermea was found guilty on count two and was found not guilty on counts three and four.

The appellants were sentenced under the sentencing guidelines to terms of imprisonment as follows. Perez, Garcia, Garza, and Rogelio Bermea were sentenced to 151 months. Guadalupe Bermea was sentenced to 135 months. Avalos was sentenced to 100 months. Avalos was sentenced to 108 months. Baldemar Bermea was sentenced to 100 months. Pedraza was sentenced to 97 months, and Rodriguez was sentenced to 92 months. An additional term of four years <6337>supervised release was imposed on each appellant as

well. There appeals followed.

* * * *

<6354>VI. SPEEDY TRIAL AND APPELLATE DELAY

A. Speedy Trial Act

Rodriguez contends that the district court erred in overruling his motion to dismiss the third superseding indictment by reason of delay. We review the facts supporting a Speedy Trial Act ruling using the clearly erroneous standard and the legal conclusions de novo. United States v. Ortega-Mena, 949 F.2d 156, 158 (5th Cir.1991).

Rodriguez was first named as a defendant (under the name Lencho Ramirez) in the superseding indictment filed on April 23, 1991, and he was arrested and made his initial appearance on May 1, 1991. A new superseding indictment (apparently the third superseding indictment in this case), was

filed on November 26, 1991. At the arraignment on this indictment, which took place on December 3, 1991, the presiding magistrate <6355> judge noted that the only change wrought by new indictment was to expand the alleged length of each conspiracy. Although the government claims that Rodriguez did not move to dismiss the new indictment, the record belies this assertion; on December 16, 1991, Rodriguez filed a motion to dismiss y reason of delay. This motion was denied after a hearing on January 3, 1992. Trial commenced, as we have noted, on January 15, 1992.

The Speedy Trial Act requires that criminal defendants be tried "within seventy days from the filing date. . . of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending whichever date last ocurs." 18 U.S.C. §

3161(c)(1). The seventy-day clock will be tolled furing certain delays enumerated in § 3161(h). Under § 3161(h)(a)(F), the clock is tolled during any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." The government contends that this provision negates Rodriguez's speedy trial argument.

[50] The Supreme Court has held that § 3161(h)(1)(F) tolls the speedy trial clock during all delays between the filing of a motion and the conclusion of the hearing on that motion, regardless of whether the delay in holding that hearing is "reasonably necessary." Henderson v. United States, 476 U.S. 321, 330, 106 S.Ct.1871, 1877, 90 L.Ed.2d 299 (1986). This indefinite exclusion is limited, however, by § 3161(h)91)(J), which limits to thirty days an

exclusion "reasonably attributable to any period . . . during whih any proceeding concerning the defendant is actually under advisement by the court." Once a hearing has been held on a motion and all necessary additional materials submitted to the court, or once a motion not requiring a hearing is filed along with necessary supporting materials, § 3161(h)(1)(J) limits the excluded period to thirty days. See Henderson, 476 U.S. at 329, 106 S.Ct. at 1876 (noting that district courts cannot use § 3161(h)(1)(F) to circumvent the thirty-day limit of § 3161(h)(1)(J)). The fact that pre-trial motions are pending, standing alone, does not necessarily toll the speedy trial clock indefinitely; the motions must require a hearing under § 3161(h)(1)(F) if indefinite tolling is to occur. See generally United States v. Johnson, _____ F.3d_____,_____, manuscript op. at 4-6, 1994 WL 419143

(5th Cir.Aug. 9, 1994) (No. 93-8875) (providing an overview of the proper interplay between §§ 3161(h)(1)(F) and (J)).

[51,52]It appears that we have implicitly agreed with the several circuits that have consistently interpreted § 3161(h)(7) to provide that all defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant and that the excludable delay of one codefendant may be attributed to all defendants. United States v. Neal, 27 F.3d 1035 (5th Cir.1994) (holding that the clock was tolled from the day the last-arraigned defendant appeared before a judicial officer because "[1]t that time, several Defendants already had filed pretrial motions, and pretrial motions of some type remained pending [for over two years],"); see also United States v. Arbelaez, 7 F.3d 344, 347 (3d Cir.1993); United States v. Butz, 982 F.2d 1378, 1381

(9th cir.) (observing that the First, Second, Sixth, Eighth, and District of Columbia Circuits also follow this interpretation), cert. denied, ____U.S. _____, 114 S. Ct. 250, 126 L.Ed.2d 203 (1993); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1477(11th Cir.), cert. denied, _____ U.S. _____, 113 S.Ct. 436, 121 L.Ed.2d 356 (1992); United States v. Tanner, 941 F.2d 574, 580 (7th Cir.,1991), cert. denied, 498 U.S. 1029, 111 S.Ct. 638, 112 >Ed.2d 675 (1991). The clock continues to run from the original indictment or arraignment, whichever was later, and all speedy-trial exclusions apply as if no superseding indictment had been returned. Id. This prevents the government from circumventing the speedy-trial guarantee through the simple expedient of obtaining superseding indictments with minor corrections. However, motions pending on the charges in the previous indictment

continue to toll the clock after the superseding indictment is returned if some of the original charges are retained. Id. at 1316-17.

[53-55] The government relies principally on the James motions filed by Rodriguez's codefendants before Rodriguez himself was indicted to toll the speedy trial clock. The record contains a pretrial ruling by the district court filed on March 4, 1991, in which the court ordered James motions by Garza, Pedraza, Baldemar Bermea, and Guadalupe Bermea to be carried with the case until trial. The district court ruled on the defendants' James motions at trial after the close of the government's evidence on January 27, 1992. The Eleventh Circuit has specifically held that James motions will toll the speedy trial clock until trial if the hearing is deferred until trial. United States v. Phillips, 936 F.2d 1252, 1254 (11th

Cir.1991); United States v. Garcia, 778 F.2d 1558, 1562 (11th Cir.), cert. denied, 477 U.S. 906, 106 S.Ct. 3279, 91 L.Ed.2d 568 (1986). It appears, however, that we have never specifically so held in this circuit. In Johnson, we held that a pending James motion that was never argued or ruled upon, even at trial, did not toll the speedy trial clock beyond the thirty days permitted by § 3161(h)(1)(J). Id., manuscript op. at 10-11 at _____ __ _____. We recognized that the result might have been different had the trial court held a hearing on the James motion immediately before or during trial. Id., manuscript op. at 9 n. 8 at _____n. 8.

We must decide the question left open in Johnson in the instant case because other pretrial motions and continuances did not sufficently toll Rodriguez's speedy trial clock to bring him within the seventy-day limit. Several of

Rodriguez's codefendants filed motion to suppress evidence prior to Rodriguez's initial appearance. These motions were ultimately heard on September 10, 1991, and the district court denied the last motion to suppress on September 12, 1991. Rodriguez's speedy trial clock thus could not have started to run until September 13, 1991.

<6357> It did not, however, because Avalos filed a motion in limine on September 11, 1991, which tolled the clock for at least thirty days under §§ 3161(h)(1)(F) and (J). According to the government, the district judge carried this motion to trial and ruled on it on the first day of the trial. Our review of the record, however, shows that the motion was mentioned at the beginning of the trial, ut we find not ruling on the motion in the portion of the record cited by the government. Giving Rodriguez the benefit of the doubt, we will presume that the

motion in limine tolled the clock for only thirty days. In any event, Rogelio Bermea obtained a continuance, granted by the court under the "ends of justice" provision of the Speedy Trial Act, § 3161 (h)(1)(8), on September 23, 1991, resetting the trial for October 15, 1991. Trial did not actually begin then, and the next pre-trial motion cited by the government was Rodriguez's own motion to dismiss by reason of delay, filed, December 16, 1991. Sixty-one days lapsed between October 15 and December 16, 1991. The motion to dismiss tolled the clock until January 3, 1992, when the motion was denied. Nine more days lapsed before the government filed a motion in limine on January 13, 1992. If we do not consider the James motions in our calculus, seventy non-excludable days lapsed before trial began on January 15, 1992, and the Speedy Trial Act was violated.

We have observed that pending motions carried for hearing just before or during trial will to the speedy trial clock indefinitely. United States v. Santoyo, 890 F.2d 726, 728 (5th Cir. 1989), cert. denied, 495 U.S. 959, 110 S.Ct. 2567, 109 L.Ed.2d 749 (1990). In Santoyo, we held that a defendant's motion in limine tolled the clock for some eight months, even though the district court carried the motion for hearing during trial soon after the motion was filed. Id. at 728. In United States v. Welch, 810 F.2d 485, 488 (5th Cir. 1987), we held that a defendant's motion to sever tolled the clock for almost two years in the absence of any showing that the defendant had unsuccessfully attempted to receive a hearing. In Johnson, we left open the question of whether James motions carried until and actually ruled upon during trial could toll the speedy trial clock throughout their pendency. Johnson,

manuscript op. at 9 n. 8 at -----n. 8. confronted with such a case, we agree with the Eleventh Circuit's decisions in Phillips and Garcia.

We conclude that the pendency of Rodriguez's codefendants' James motions tolled the speedy trial clock throughout Rodriguz's prosecution because they were ultimately heard and ruled upon during trial. His Speedy Trial Act claim is therefore without merit.

XI. CONCLUSION

For the foregoing reasons, we AFFIRM the judgments below.

ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7349

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BALDEMAR BERMEA, ROGELIO BERMEA, LORENZO RODRIGUEZ,
MANUEL GARCIA, HONORIO GARZA, MATILDE PEREZ, GUADALUPE BERMEA,
ENRIQUE AVALOS, and TEODORO PEDRAZA,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITIONS FOR REHEARING

(October 7, 1994)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing, as to Rogelio Bermea, Lorenzo Rodriguez, and Honorio Garza, filed in the above case are DENIED.

ENTERED FOR THE COURT:

/S/ Carolyn D. King

United States Circuit Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3161

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and at the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such

thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consent in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through

counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment

or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 316(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence

within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attach, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retry the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period

following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such

period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any pretrial motions from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization except that any time consumed in excess of ten days from the date an order of removal or an

order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United

States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge has there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the

attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in

the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case is which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand

jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted cause of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea

becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause

notice to that effect to be sent promptly to the attorney for the Government who cause the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of inter jurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or

other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

(a)(1) If, in the case of any individual against whom a complaint is filed charging such

individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the

time limit by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal; and the impact of a reprosecution on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo

contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would

have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The Court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.